UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CURRAN & CO.

Cases 30–CA–16296-1
30–RC–6057

LOCAL 1510, MICHIGAN REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

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Nathan D. Plantinga, Esq., of Grand Rapids, MI, for the Respondent.
Nicholas R. Nahat, Esq., of Southfield, MI, for the Charging Party.

Decision

Statement of the Case

David L. Evans, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Marquette, Michigan, on April 24 and 25, 2003. On November 12, 2002,[1] Local 1510, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union, the Petitioner or the Charging Party) filed a petition in Case 30–RC–6507 seeking certification by the National Labor Relations Board (the Board) as the collective-bargaining representative of certain employees of Curran & Co. (the Employer or the Respondent). On November 19, the Regional Director approved a stipulated election agreement that provided for a Board-conducted election among the Respondent's carpenters who were employed by the Employer. On December 17, an election was conducted the result of which was a 3-3 tie (with no challenged ballots cast); therefore, the Union was not certified as the majority representative of the Respondent's employees. The Petitioner thereafter timely filed with the Regional Director objections to employer conduct affecting the results of the election (the objections). On December 23, the Union also filed the charge in Case 30–CA–16296-1 alleging that by certain acts and conduct the Respondent had committed certain unfair labor practices against its employees. On February 28, 2003, the Regional Director issued a complaint alleging that the Respondent had violated Section 8(a)(1) of the Act by threatening its employees and that the Respondent had violated Section 8(a)(3) of the Act by issuing warnings and suspensions to employees Jason Dyer and Kenneth Bartol.[2] The objections are of the same substance as the allegations of the complaint, and, also on February 28, 2003, the Regional Director issued an order consolidating the complaint and objections for hearing before a Board administrative law judge. The Respondent filed an answer to the complaint admitting that this matter is properly before the Board but denying the commission of any unfair labor practices; the Respondent further denies that it engaged in any conduct that would have upset the laboratory conditions required by the Board for the conduct of a fair election.

[1] Unless otherwise indicated, all dates mentioned are in 2002.
[2] Section 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination ... to encourage or discourage membership in any labor organization."

Upon the testimony[3] and exhibits entered at trial,[4] and after consideration of the briefs that have been filed, I make the following findings of fact and conclusions of law.

I. Jurisdiction

As the Respondent stipulated at trial, it is a corporation with an office and place of business in Marquette, Michigan, where it is engaged in the business of residential and commercial construction. During the year preceding the issuance of the complaint, in the course and conduct of those business operations, the Respondent purchased from suppliers that were located in Michigan goods and materials valued in excess of $50,000, which goods and materials those suppliers had purchased directly from other suppliers that were located outside Michigan. Therefore, at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. As the Respondent admits in its answer also amended at trial, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices And The Alleged Objectionable Conduct

A. Facts

Mark Curran is the Respondent's president and sole owner, and he is the only supervisor of the Respondent's employees. The Respondent's employees have never been represented by a labor organization. During 2002, the Respondent employed 6 carpenters: Patrick Aho, Kenneth Bartol, Jason Dyer, Christopher Hytinen, Ken Josefsen and Marc Soetaert. The Respondent's office is located in a house on Third Street in Marquette. The Respondent also owns a small storage facility on Fourth Street in Marquette. Curran personally owns a larger facility (called "the barn") on Wright Street in Marquette where the Respondent also stores equipment. During the events of this case, Curran assigned the Respondent's employees to re-roofing and other modifications of the barn. Curran also operates a coffee shop in Marquette, and he owns and operates several apartment buildings in the area which the Respondent's employees built.

Before the events of this case, the Respondent did not have a progressive disciplinary system (such as the issuance of an oral warning for an employee's first disciplinary offense, written warning for a second, suspension for a third, and discharge for a fourth). In fact, the Respondent did not even have warning notice forms. Curran testified that for disciplinary offenses he would speak to employees, or place a "reminder" in the form of a brief note in the offending employee's paycheck and that usually took care of the matter. If it did not, Curran would simply discharge the offending employee. On at least one relevant occasion before the events of this case, however, Curran sent more than a reminder along with an employee's paycheck. On April 30, Curran notified alleged discriminatee Bartol that: "You missed the mandatory safety class on 4/27/02. This is normally grounds for termination, but since this is your first time missing we will let it go for now. Please do not let this happen again." April 27 was a Saturday upon which Curran had scheduled a session of OSHA-required training. All employees were required to attend, and they were paid for their attendance. All employees except Bartol did attend. On cross-examination, Bartol acknowledged receipt of Curran's April 30 note, but he denied that he had ever considered it a warning.

In early November, Union representative Robert O'Neill met with some of the Respondent's employees and secured union authorization cards from them. Bartol and other witnesses testified that Bartol was the chief employee-proponent of the signing of the cards, but there is no evidence of Curran's knowledge of any of his activities in that regard.

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[3] Credibility resolutions are based on demeanor and any other factors that I may mention in the narrative.

[4] Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate without ellipses words that have become extraneous; e.g., "Doe said, I mean, he asked ..." becomes "Doe asked ...". When quoting exhibits, I have retained irregular capitalization, but I have sometimes corrected certain meaningless grammatical errors rather than use "(sic)." All bracketed entries have been made by me.

Alleged unlawful warning notices and threats

On November 11, when Curran was using several of the Respondent's employees to work at the barn, he assigned Bartol and Dyer to shingle the roof. The Respondent provides fall-prevention harnesses (or "fall protection," as the witnesses called the harnesses) for employees' safety while they work on roofs, but employees are not required to wear such every time that they work on a roof; it depends on the pitch of the roof and other circumstances such as the presence of snow or ice. Curran testified that at the beginning of the workday on November 11 he noticed that Bartol and Dyer were preparing to ascend to the roof without fall protection. Curran testified that, because there was ice on some parts of the roof, he told Bartol and Dyer to "make sure and wear your fall protection," and then he left the project and went to his office.

At some point during that morning, or during the early afternoon, Union representative O'Neill came alone to Curran's office. O'Neill told Curran that a majority of the Respondent's employees had signed authorization cards designating the Union as their collective-bargaining representative; O'Neill then asked Curran to recognize the Union as such. Curran declined in forceful terms. As Curran admitted at trial, he told O'Neill, "I'm going to shut the guys down right now, lay them all off." Additionally, O'Neill credibly testified that Curran told him that, because the employees had signed authorization cards, and because the Union was seeking recognition, he would "close the doors and the Company." After receiving this response, O'Neill departed the premises. (No employees had been present during this confrontation between Curran and O'Neill.)

Curran testified that, also on November 11, apparently immediately after his confrontation with O'Neill, he talked to several other area contractors who had had some experience in dealing with unions. Curran testified that the contractors told him that they had spent up to $70,000 in litigation expenses as a result of organizational attempts by their employees and that he should "document, document, document." Still during November 11, after Curran had talked to the other contractors, he created a warning notice form. Using the Respondent's letterhead, the form states, in large, bold-faced type, and underlined, "Warning Notice." The form has blanks for: "Today's Date," "Employee's Name," "Date of Violation" and "Nature of Violation." Except for indications of places for Curran's signature and its date, nothing else is pre-printed on the form (such as what might happen if further offenses occur).

Curran testified that later in the afternoon of November 11, he returned to the site and saw that neither Bartol nor Dyer was wearing fall protection; Curran testified, "I don't know if they ever had it on." Curran testified that he "again" told Bartol and Dyer to put on the fall protection, and he decided to issue warning notices to the pair. On November 12, Curran completed such warning notices. At "Nature of Violation," each notice states "Lack of fall protection while working at Barn at [address]." Tuesdays are the Respondent's paydays; November 12 was a Tuesday, and Curran placed the warning notices in the envelopes of the paychecks that Bartol and Dyer received later that day. The complaint alleges that the Respondent issued these warning notices in violation of Section 8(a)(3).

Curran testified that, on previous occasions that he saw employees without fall protection, "We may have sent out a small slip in their paycheck reminding them that if they are in a dangerous situation to wear fall protection. We've done that numerous times with safety glasses and stuff like that. ... Normally I had just done it verbally." Examples of the Respondent's prior written reminders to employees were placed in evidence. Except for the April 30 notice to Bartol as quoted above, the documents only reminded employees of what behavior was expected. None of the Respondent's reminders to the employees used the word "warning," and none warned of adverse consequences that might follow from derelictions such as failures to wear safety equipment or failures to be on time for work.[5] As examples of prior "verbal" (or oral) reminders or warnings, Curran testified "it would be, you know, "Why are you late?" or I might -- you know, if they were a couple minutes late I would look at them."

[5] For example, the Respondent introduced a note to Aho that states that: "It has come to our attention that you have been late twice within the past week, on 10/18/02 and 10/22/02. Please be aware of this."

Bartol and Dyer testified that on November 11, before they ascended to the roof of the barn, Curran told them to use their own judgment whether to wear the fall protection; then, after leaving the job for a while, Curran returned and told them to put on the fall protection. They immediately went to the ground, put on the harnesses, returned to the roof, and worked the remainder of the day on the roof wearing fall protection.

I credit Bartol and Dyer that they put on the fall protection when Curran told them to do so. If that had not been the case, Curran, as long as he was issuing any formal warning notices, would have issued warning notices for more than just not putting on the fall protection. Curran assuredly would have issued to Bartol and Dyer warning notices for insubordination because Bartol and Dyer had directly defied him. Even before that, if Curran's testimony had been true, he would have done more than "again" telling Bartol and Dyer to put on the fall protection when he returned to the jobsite and found that he had been directly disobeyed. Finally, if Bartol and Dyer had so directly disobeyed Curran's first orders, Curran would have made sure that, at least when he returned to the jobsite, they did put on the fall protection. Obviously, Curran did not do so because he was not even able to testify that Bartol and Dyer "ever" put on the fall protection during the day.

Curran conducted a series of campaign meetings. The complaint alleges that at a November 12 meeting at the barn, in violation of Section 8(a)(1), Curran "told employees that he might close the business [and] that they would lose work and be laid off if they selected the Union as their collective-bargaining representative." On brief, p. 7, the General Counsel argues that Curran admitted in his testimony that he told employees in the November 12 meeting that the Respondent "would" no longer be competitive if they selected the Union as their collective-bargaining representative and that jobs would be lost as a result. In so arguing, the General Counsel cites (but does not quote) Tr. 344, LL. 13-16. The cited testimony, however, is only that: "I told the employees that, if our costs go up, we wouldn't be competitive and to be competitive against other non-union companies is very difficult. And if you're less competitive, you get less jobs and less work."

As well as the alleged admission by Curran to support the threat allegation, the General Counsel relies on testimony of Dyer and Aho to support the allegation. Dyer testified that all he could remember was that Curran told the employees "that he could not afford union wages [and] how the union was a dying breed in the UP [Upper Peninsula of Michigan]." Aho testified that all he could remember of the November 12 meeting was that:

> He [Curran] had told us that he was aware of the union organization and he told us that his first thought was to shut down the Company and just not to deal with any of it, and he said he decided not to do that and he was going to see what happens over the next couple of months.

Curran, however, credibly denied this testimony by Aho. In addition, on cross-examination alleged discriminatee Bartol flatly denied that Curran said "anything at any time during that meeting about closing or selling the business." Employees Hytinen and Josefsen, when called by the Respondent, also credibly denied that Curran mentioned closing the business during the November 12 meeting. On the basis of this credibility resolution, I shall recommend dismissal of this allegation.

Bartol credibly testified that in mid-November, as he was riding in a truck between jobs with Curran, Curran asked him how he felt about the Union; Bartol told Curran that he favored it. Additionally, Curran testified that, before the December 17 Board election, he knew that Bartol favored the Union because of the way Bartol was "aggressive" at the campaign meetings that he conducted. (Curran did not testify in what manner Bartol was "aggressive.") Curran denied knowing that any other employee favored the Union, and there is no evidence that he did.

Curran issued 2 more warning notices to Bartol on November 15. On November 14, in violation of the Respondent's rule to the contrary, Bartol smoked a cigarette during working time (i.e., not during lunch or break time, which would have been permissible, as long as he had done it in an out-of-doors location). Also, on November 15, Bartol appeared for work 2 minutes late. Curran witnessed both of these events, but he did nothing about them at the time. Curran testified that later on

November 15, however, he saw Bartol working on a steep roof again without fall protection. According to Curran:

> [I] hollered up to him and I told him to put his fall protection on .... He turns around and he told me to "fuck off." So, at that point in time I was flustered and I went to the office and I wrote these two issues up. ... I wouldn't have written him up if he hadn't of made that comment. He just went too far. It was insubordination.

The first warning notice that Curran issued to Bartol on November 15 stated that the date of the violation was November 14 and that the nature of the violation was "Smoking on jobsite." The second warning notice states that the date of the violation was November 15 and that the nature of the violation was: "Walking onto jobsite at 8:02 a.m. and not ready to work. Employee is to be at jobsite and ready to work at 8:00 a.m." The complaint alleges that by the issuance of these warning notices the Respondent violated Section 8(a)(3).

In rebuttal, Bartol did not deny that he worked without fall protection on November 15, and he did not deny that Curran then told him to put it on; Bartol did deny, however, that he ever told Curran to "fuck off."

I credit Bartol. If Bartol had said such a thing to Curran, Curran would have at least written a warning notice to Bartol for the "insubordination" in which he supposedly engaged. Citing certain vague (and incredible) testimony by Curran, the Respondent argues on brief that Curran did not issue Bartol a warning notice for insubordination because the Respondent's employee handbook does not mention insubordination. The only employee offense mentioned in the Respondent's handbook is smoking; moreover, on December 19 Curran issued to Dyer a warning notice for "gross employee insubordination," as discussed below.

Also on November 15, the Respondent placed in a local newspaper an advertisement stating:

> Surplus Sale
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> • 1995 40' forklift, high hours, $39,900. • 1987 Skidsteer with tracks, $11,000. • 1999 Dodge 4WD, 1/4 ton truck, $15,900. • 80' X 200' lot, off Wright Street with 40' X 40' barn with easement, $185,000. Curran & Co. [telephone number].

(A 40-foot forklift is a forklift that has a 40-foot boom; a Skidsteer is a utility vehicle of some sort.) The advertisement ran from November 15 through 29. The complaint alleges that by placing this advertisement in the newspaper the Respondent violated Section 8(a)(1). Different employees testified that they used different pieces of the listed equipment for various amounts of time at different times. Curran testified that the equipment was rarely used, and the General Counsel's witnesses conceded on cross-examination that the equipment was not absolutely necessary to do the jobs to which they were usually assigned. On direct examination, when asked why he placed the listed equipment up for sale, Curran testified:

> Well, previous to the union drive, I was looking at purchasing an apartment building and I thought maybe that might go through. And then after I talked to fellow contractors and they terrified me on how much it would cost for an organizing drive and defending myself with legal costs where they were telling me it was upwards of $70,000.00 is what they physically spent, I decided I needed to raise some money. And that's why I put the equipment up for sale.

Curran gave no other reasons for the sale. Curran did testify that, at some point, he reached the conclusion that the forklift was not worth what it had cost the Respondent and that the proceeds from selling it could pay for "a lot of labor," but he did not testify when it was that he reached those conclusions, and he did not testify that those conclusions played a part in his decision to place the forklift, or the other equipment, or the barn, up for sale. Curran testified that the listed equipment was not really "essential," but, again, he did not testify when he reached that conclusion, and he did not testify that the lack of essentialness was a reason for placing the equipment up for sale.

The General Counsel introduced a December 5 campaign letter that Curran distributed to all employees. In arguing the disadvantages of selecting a union, and the advantages of staying union-free, Curran uses topic lines to introduce paragraphs that detail his position. The topic lines for the paragraphs about remaining union-free include "Many Benefits Have Been Offered," "Flexible Hours," and "Good Work Environment." Under "Flexible Hours," Curran points out that he has allowed employees time off (even to interview for other jobs) without penalty. Under "Good Work Environment," Curran states:

> I try to provide a pleasant, yet safe, work environment. We have some of the best and most ample tools to work with. How many of you have worked for another contractor who had old tools or you had to provide your own tools? We continuously try to re-invest into the Company. If we didn't have the construction company, would we really need the barn, forklift, trailers, or numerous tools? These are there to make your job easier, more productive, and more profitable.

The next topic line of Curran's December 5 letter to employees is "What This Means"; under it Curran states:

> Some of you may remember years past when we employed four guys. We only had one air-nailer, one Skill saw, and one Sawsall to work with. We have come a long way since then. Curran & Company is only a small part of my life, but it is a very enjoyable part. I do not rely on Curran & Company for my sole income, and with the Union we may not be competitive enough to stay in business. Do you really expect our long-term customers to pay significantly more to help you keep your job?

In a December 13 campaign letter to employees, under the topic line of "Unions Can't Stop Layoffs," Curran further tells the employees, inter alia:

> Unions mean loss of flexibility. One of the benefits of a smaller shop is flexibility. I can deal with each of you as individuals. I can make exceptions. I can take into account your individual circumstances, and we can get creative in finding solutions to your issues. If a union comes in, and if we end up negotiating a contract, we will have only one way of doing things. That means a loss of your individual voice and a loss of the ability to make decisions based upon the circumstances, as opposed to what a contract says should happen every time.

On December 18, Curran conducted another campaign meeting at the barn. The complaint does not allege that anything that Curran said during the meeting, of itself, violated Section 8(a)(1). However, the complaint does allege that the Respondent violated Section 8(a)(1) during the meeting because Curran "displayed 'for sale' signs placed on business machinery." According to the credible testimony, during the meeting of December 18, a "for sale" sign was on the forklift which was parked just outside the barn. Also, on the floor of the barn, leaning separately against a wall so that they were visible to the employees who were attending the meeting, were 2 more "for sale" signs; one had listed at the bottom that it was for the Skidsteer, the other for the Dodge pickup. As he gave his December 18 speech, Curran did not refer to the signs or the fact that he was attempting to sell the barn and some equipment.[6]

The complaint alleges that, by Curran's December 5 and December 13 letters, the Respondent "threatened employees with job loss [and] more onerous and less flexible working conditions." The complaint further alleges that, by the placement of the newspaper advertisements and by the display of the "for sale" signs, the Respondent also violated Section 8(a)(1). General Counsel further contends that the December 5 letter demonstrates the threatening nature of the Respondent's newspaper advertisement and the "for sale" signs that the Respondent later placed about the barn and on the equipment.

[6] Dyer testified without contradiction that, through March, 2003, the Respondent had never sold any of the listed equipment.

The December 3 suspension of Bartol

Bartol testified that about 2 weeks before Thanksgiving, which fell on November 28, Curran asked him if he had any plans for the holiday and that he replied that he would like to visit Green Bay where many members of his family lived. Bartol testified, however, that at that time he did not ask for permission to be off work on November 29. With their paychecks of November 26, all of the Respondent's employees received reminders from Curran that November 29 was a mandatory work day. Nevertheless, on November 27 Bartol asked Curran if he could have November 29 off. Bartol testified that he did not give Curran a reason for his request to be off on November 29, but he testified that he is the single parent of one child and that he asked Curran for November 29 off because his regular daycare provider, an institution, was closed on that date. Bartol further testified that when Curran refused to give him the day off, he arranged to have a local woman who had baby-sat for him before keep his child on November 29. When he brought the child to the woman's house that morning, however, she was not there. Bartol took his child back home and then called the Respondent's office. No one answered, and he left a voice-mail message that he could not come to work that day because he had no daycare for his child. Bartol further testified that, in fact, he stayed in Marquette, with his child, during November 29 and that he did not go to Green Bay on November 29.

Bartol appeared for work on Monday, December 2. Further on direct examination, Bartol testified:

> Mark told me just to go ahead and go home, that he needed to punish me for missing work. He said that he would call me and let me know what that would be. He never called me so I showed up for work the next day. He told me to go ahead and work throughout the day and he would think of a punishment by the end of the day. The end of the day came. He called me to the side. He told me that he could fire me but he wasn't going to fire me. He was going to give me a three-day, without [pay], suspension. He gave me this. I believe it was in an envelope and that was pretty much it. I went home from that point.

Curran then handed Bartol another warning notice, and Bartol left the premises. In the warning notice, Curran recites that on November 22 Bartol had asked to be off work on November 29 because "you were planning on traveling to Green Bay, WI, to visit with family," that other employees had requested November 29 off and Curran had refused all such request because of the Respondent's workload, that with his November 26 paycheck Bartol had received a written reminder that he was due at work on November 29, that Bartol was the only employee who did not appear for work on November 29, that Bartol "called in after the start of your shift and informed me that you would not be coming to work" and that "you have since claimed that you were not in Green Bay (as you had planned), and that your inability to make it to work was because you could not find daycare for your child." The notice further recites that Bartol had previously been warned about "missing mandatory work time," that his prior warning (the one of April 30, as discussed above) had "stated that your conduct was grounds for termination," that the "problems are magnified by the fact that your efforts have not improved since I hired you back in late September after your second resignation in less than two years,"[7] that on November 29 "you not only missed work without proper excuse, but you ignored my refusal of your request for time off," that Bartol's conduct was a "terminable offense," but that "to give you one final opportunity to demonstrate a commitment to your job," he was only to be suspended for December 4, 5 and 6. The warning notice (really a letter) concludes: "Any further failure to appear for a scheduled workday within the next 30 days will result in your termination. Unexcused absences beyond that period will result in discipline, up to and including termination, depending on the circumstances." The complaint alleges that, by the 3-day suspension of Bartol on November 3, the Respondent violated Section 8(a)(3).[8]

[7] Bartol had, in fact, quit twice during the previous 2 years.

[8] The complaint does not allege that the Respondent's December 2 suspension of Bartol (by sending him home on that date for the entire workday), or that the issuance of the December 3 warning notice itself, separately violated the Act.

On cross-examination, when asked why he had not told Curran that the December 3 warning notice was in error where it stated that Bartol had originally asked for November 29 off so that he could visit Green Bay "to visit with family," Bartol replied: "When he came up with his punishment he mentioned the fact that he thought I was going to Wisconsin but he later found out that I had daycare because he -- you know, when he heard it on the answering machine. So we did clarify that before I got the letter."

Curran testified that both Aho and Bartol asked to be off on November 29. He refused both, and Aho appeared for work as scheduled. Curran further testified that Bartol told him that he wanted the day off "to go to Green Bay to visit family and friends." When Curran refused, Bartol replied, "Fine." Curran acknowledged that he received Bartol's voice mail message that he was going to be absent on November 29 because he could not find daycare for his child, but, as Curran further testified, "In my feeling he was blatantly lying to me." When asked specifically why he issued the December 3 warning notice and suspension, Curran testified:

> Well, number one, it was a mandatory work day. He was supposed to be there. Traditionally, I would terminate somebody for not showing up and directly -- virtually just disobeying what I asked them to do. In the past, terminating people was relatively easy. We didn't do written warnings. His past record also was very poor. I mean, he missed the mandatory first aide class [on April 30] and I decided, well, I'll write him up ... and I gave the 3-day suspension. I thought that would be a lot more lenient than firing him.

Curran named Gary McMahon, Kenneth Liberstat, Jeff Hart and Mike Martin as employees whom he had terminated for absenteeism during the previous 2 years. During cross-examination by the General Counsel, Curran testified: (1) On November 18, 2000, McMahon worked until about 10:00 a.m., at which point he walked off the job stating that he had "had enough." About 11:00 Curran attempted to call McMahon "to see what the problem was." (Curran got no answer, but he left a message on McMahon's machine.) About 3:00 p.m., McMahon returned to the job and stated that he had made a mistake. Curran allowed McMahon to work the remainder of the work day, but he told him that if he ever did such a thing again he would be discharged. On the next day, McMahon failed to appear for work, and Curran discharged him. (2) On March 12, 2001, Liberstat did not appear for work; he did call in at 11:00 a.m. (or 3 hours after starting time) and said that he had been arrested and that he needed to borrow $180.00; Curran agreed to get the money to Liberstat (and Curran later did so), and Curran told Liberstat to be at work the next day. On March 13, Liberstat again did not appear for work; he did call in at 8:30 a.m. to state that "he had to take care of some business" and would not be coming to work that day. On Wednesday, March 14, Liberstat showed up for work on time, but he also announced that he would be leaving at noon. When Curran asked when Liberstat would return for work, Liberstat replied that it would be Monday, March 19. Curran replied, "Well, that's okay." On March 19, however, Liberstat again failed to appear for work; instead, he sent a fax stating that he would not be at work until March 20 and that he wanted a raise in pay. Curran's testimony on the point was vague, but it must have been at that point that he decided to discharge Liberstat. (3) Hart failed to appear for work, or even call in, on Friday, August 3, 2001; Curran called Hart at home and left a message which Hart did not return. On Monday, August 6 and Tuesday, August 7, 2001, Hart also failed to appear or call in. Curran did not testify whether August 8 and 9 were work days, but he did testify that on August 10 he told Hart that he was discharged. (4) On April 22, Curran discharged Martin "for not showing up" for work. If Martin failed to appear for work on more than one occasion, the General Counsel did not attempt to bring out the fact. On brief, the General Counsel contends that the cases of McMahon, Liberstat and Hart, rather than bolstering the Respondent's contentions that it always fired transgressors such as Bartol, constitute evidence of disparate treatment against Bartol. (The General Counsel does not mention Martin on brief).

I certainly do not believe Bartol's testimony that, 2 weeks before Thanksgiving, Curran asked him if he had any plans for the coming holiday. Bartol and Curran did not have the kind of relationship that would readily admit, or even permit, that kind of small talk. Moreover, I do not believe that Curran would have let go without negative comment Bartol's claimed response that he would like to go to Green Bay to visit his family over Thanksgiving. Curran testified that the Friday

after Thanksgiving was always a workday, and it is clear that he wanted all employees present on November 29. More important, on this point Bartol appeared to be making his testimony up as he went along. Specifically, Bartol came up with the conversation that allegedly occurred "a good couple weeks before" Thanksgiving deep into his cross-examination; if there had been any truth to that testimony, Bartol would have told the General Counsel during pre-trial, and the General Counsel assuredly would have brought it out in direct examination to refute what Curran had stated on the face of the December 3 warning notice. Also, when asked on cross-examination why he had not challenged Curran's statement on the December 3 warning notice that he had requested November 29 off "to visit with family," Bartol evaded answering by saying that Curran had admitted the error when Curran handed the notice to him. As well as being evasive, this was unbelievable testimony that Curran had typed up, and delivered, a statement that he knew to be false and knew that it could easily be proved to be false. In summary, I credit Curran's testimony that Bartol had asked for November 29 off to visit relatives in Green Bay. And I credit Curran's testimony that he thought that Bartol was "blatantly lying" to him when he called in on November 29 to say that he would be absent because he could not find daycare.

The December 19 suspension of Bartol

On December 18, the day after Bartol served as the Union's observer at the Board election, Bartol, Dyer and Soetaert were assigned to work at a customer's building in Marquette. Bartol testified that he felt that Soetaert was at the job as a leadman because Soetaert had a cell phone. Soetaert was assigned to do inside work; Bartol and Dyer were assigned to finish shingling the roof, a project that they had started the day before. Curran was present at the project at the start of the workday. It was cold, it had rained during the night before, and there was some ice on the roof. Curran climbed up to the roof for an inspection. When he returned, he told Bartol and Dyer that it was too icy to work at that time, that they should leave, and that they should return at noon. Bartol and Dyer testified during their direct examinations that Curran told them that he also would return to the jobsite at noon and, when he met with them, he would decide if the roof was safe enough for them to work on during the afternoon. Curran testified that he told Bartol and Dyer to return at noon and "knock out" the roof, meaning "finish the job." Specifically, Curran testified: "I expressly stated, you know, have lunch early, stay from 12 to 5, knock this thing out, get this thing done so we don't have to get back up there because it's getting more and more towards the winter." On cross-examination, Curran testified, "I don't believe that I told them that I would be there" at noon.

Bartol and Dyer did return to the job at noon. They waited around for 15 or 20 minutes and then left the jobsite. Before they left, neither Bartol nor Dyer went up to the roof to see if there was still ice that would have rendered it still unsafe to work on. Bartol and Dyer did ask Soetaert (who had continued working inside after Curran, Bartol and Dyer had left that morning) if he needed any help; Soetaert responded that he barely had enough work for himself. Soetaert, who was called by the Respondent, testified that he did possess a cell phone (which he personally owned) on the job on December 18. Soetaert further testified that, during the 15 or 20 minutes that Bartol and Dyer were waiting around, he asked them if they wanted to use the cell phone to call Curran "and find out what to do," but Bartol and Dyer declined his offer. Soetaert further testified that he told Bartol and Dyer that they "probably should" call Curran before they left the jobsite because sometimes Curran had inside work on other projects to which employees could be sent on inclement days. Bartol and Dyer denied that Soetaert offered them the use of the cell phone.

On December 19, when Bartol re-appeared for work, Curran presented him with a warning notice that stated:

> Nature of Violation: On Wednesday, December 18, I directed you to go to a job site at 12:00 p.m. to do some roofing work. Although you arrived at the instructed time, you left approximately fifteen to twenty minutes later. You did not have permission to leave work, and you did not notify me that you were doing so. Indeed, you refused a co-worker's offer of a cell phone for use in calling me and did not even attempt to contact the office. You were aware of the work that needed to be done, and you made no effort to do it. Nor did you make any effort to

discern whether the roof was unfit for work due to weather. You simply waited for a few minutes and then felt entitled to walk off the job.

Frankly, I am reluctant to give you yet another warning. You just received a suspension for missing mandatory work time, and the suspension notice was clear that another offense within 30 days would result in your termination. Termination would thus be wholly justified in this case. At the risk of some inference that I am not serious about these repeated issues, I am going to give you one last opportunity to salvage your job performance. As a result, you are hereby suspended, without pay, for 10 workdays.

Upon receiving this notice, Bartol left the job. The complaint alleges that by the 10-day suspension of Bartol the Respondent violated Section 8(a)(3). Also on December 19, Curran issued a warning notice to Dyer. In that warning notice, Curran stated that because Dyer had left the jobsite without permission, he was guilty of "gross employee insubordination" which was "normally grounds for termination." Curran stated, however, that because this was Dyer's first offense of not being at work when scheduled, he was only being warned that any of his absences from work during the next 30 days would result in his termination and that, depending on the circumstances, absences after that period may also result in his termination.[9]

On cross-examination, Bartol testified that at noon on December 18 a "good, steady rain" was still falling, and that, even absent ice, the roof would have been unsafe to work. Bartol further testified that, before he and Dyer left the jobsite, it did not occur to him to attempt to call Curran because "normally" employees would simply leave, without notifying Curran, if weather was too bad to work. Bartol testified at another point, however, that "normally" the lead man on the job (such as he claimed that Soetaert was on November 18) would call and let Curran know if employees were leaving because of bad weather.

Curran testified that he returned to the jobsite at 1:00 p.m. on December 18. When he did so, Soetaert reported to him that Bartol and Dyer had left even though Soetaert had offered them his cell phone to call Curran. Curran testified that: "They just bailed out and left the job. Okay. It's gross insubordination. Nobody should just walk off the job. They should be -- if you walk off the job you should be terminated." Curran testified that, under the circumstances, he considered the warning notices and the suspension of Bartol to be leniency. Curran further testified about Bartol, "I would have liked to have dismissed him but I didn't want to have to litigate anything so I decided to suspend him. As we can see from the past, he missed his mandatory safety meeting, you know, he missed the Thanksgiving mandatory work day -- the day after Thanksgiving. He has now missed this." On cross-examination, Curran agreed that he would not force an employee to work in unsafe conditions, but he further added that if he were not on the scene, "I would expect them to give me a call."

During Dyer's cross-examination, he was asked and he testified:

Q. Is it your understanding that you are free to leave before 5 [p.m.] without telling Mark that you are leaving if the weather is bad?
A. No.
Q. That's not your understanding, is it?
A. No.

For the Respondent, current employee Hytinen also testified that employees who wished to leave before quitting time were required to call Curran "personally" before doing so. And current employee Josefsen testified that in cases of bad weather, "We can take off but we have to call Mark before or try to get ahold of Mark before we take off."

[9] The complaint does not allege that by issuance of the December 18 warning notice to Dyer the Respondent also violated the Act. The Respondent argues that this failure is an admission that the conduct of Bartol and Dyer was validly punishable by the Respondent. There is, however, no evidence that the Respondent knew or suspected that Dyer possessed prounion sympathies, and no charge was filed on Dyer's behalf; therefore, any such allegation would have been futile.

B. Analysis and Conclusions

Alleged threats

I have credited Curran's denial that at the November 12 campaign meeting he orally threatened the Respondent's employees with closure of the business if they selected the Union as their collective-bargaining representative, and I shall accordingly recommend dismissal of that allegation of the complaint. Nevertheless, I agree with the General Counsel that the Respondent did threaten the employees with job loss by use of its letters to employees and by use of its advertisements for sale of the Respondent's property that they had, at least to some extent, been using to make work easier and more productive for them and more profitable for the Respondent.

Curran testified that he placed the advertisements and displayed the "for sale" signs because he needed the money to pay lawyers to fight the organizational attempt and to take advantage of a good investment opportunity that another apartment building had presented. Curran, however, did not testify when the investment opportunity was presented to him, and Curran did not testify that his lawyers were then making demands upon him for money that he did not have. I therefore do not believe Curran's stated reasons for placing the newspaper advertisements and for displaying "for sale" signs. But even if Curran then had an especially good investment opportunity, and even if his lawyers were making such demands, or both, Curran's motivation in placing the newspaper advertisements and displaying the signs is not the determining issue. As the Board held in *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975):

> We long have recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act.

That is, the impact on a reasonable employee is the touchstone of whether an employer's statements violate Section 8(a)(1).[10]

In his letter of December 5, as he was arguing that the employees should reject the Union as their collective-bargaining representative, Curran pointed out to the employees that he had provided "a pleasant, yet safe, work environment" by providing the barn, the forklift and other equipment. Then Curran raises the specter of the loss of the employment that had occasioned the purchase of the barn and tools by asking, "If we didn't have the construction company, would we really need the barn, forklift, trailers, or numerous tools?" This was a true rhetorical question; Curran was actually telling the employees that they needed "the barn, forklift, trailers, and numerous tools" to work in the construction industry, at least to work as productively and as gainfully as they had theretofore.[11]Then Curran, by use of the newspaper advertisements, told the employees that he was positioning himself to get out of the business that provided their livelihoods. In case any employees missed the advertisements, Curran called them all together in the December 18 campaign meeting at the barn with "for sale" signs for the forklift and other pieces of the equipment prominently displayed. None of this would have been lost on a reasonable employee; a reasonable employee would remember that Curran had also stated in his December 5 letter that, "Curran & Company is only a small part of my life, but it is a very enjoyable part. I do not rely on Curran & Company for my sole income." That is, Curran was telling the employees that he was in the construction business mostly for the enjoyment,

[10] The coercive element in Curran's ostensible sales efforts that I find infra seemingly would have been non-existent if Curran had told the employees something like "Don't worry about the "for sale" signs; I'm just raising money for my lawyers" or "... for an investment." If intent were an issue I would therefore find that Curran's failure to share his professed reasons with the employees proves that he intended to threaten them.

[11] The employees' admissions that they could have worked without the forklift or Skidsteer are meaningless; presumably, any carpenter could ultimately get his work done with a hand saw rather than a power saw, a hammer rather than a staple gun. However, the advertised tools undoubtedly made the work quicker and easier. Also, the tools most probably made the Respondent more profitable and thereby made the employees' jobs more secure because the Respondent still had not sold any of them by the date of the hearing.

something that would be as easy to forgo as a hobby. And along with the hobby-type of business, of course, would go the employees' jobs. The employees would have realized that all of these statements were advanced for one reason — to get them to reject the Union as their collective-bargaining representative. And they would have realized that Curran was telling them that the only way to have him keep the advertised property, and have him keep the merely "enjoyable" portion of his life that their livelihoods represented, was to follow Curran's wishes and reject the Union. As the complaint alleges, these were actions that threatened the employees with job loss, and I find and conclude that by these actions the Respondent violated Section 8(a)(1).[12] As well, I shall recommend that the corresponding objection of the Union be sustained.

I disagree, however, with the complaint allegation, and the General Counsel's further contention, that the Respondent's December 13 letter separately violated the Act because it forecasted a loss of "flexibility" if the Union were selected by the employees as their collective-bargaining representative. Generally, an employer does not violate the Act by informing employees that unionization will bring about "a change in the manner in which employer and employee deal with each other." *Tri-Cast, Inc.*, 274 NLRB 377 (1985). In support of his contention to the contrary, the General Counsel cites only the authorities of *VJNH, Inc.*, 328 NLRB 87 (1999) and *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995). In *VJNH,* the forecasted loss of flexibility was not alleged as a Section 8(a)(1) violation. A forecast of loss of flexibility was alleged as conduct that had unlawfully affected the results of a Board election, and the administrative law judge found that the forecast was objectionable; the Board, however, expressly refused to pass on that issue as it sustained other objections. And in *Allegheny Ludlum*, the Board's finding of a Section 8(a)(1) violation was apparently premised on the fact finding of the administrative law judge that "[f]lexibility was the catchword for a variety of situations in which employees wanted more flexibility in the use of sick time, vacation time, and personal time." This factor is missing in this case; no one had mentioned flexibility, or a desire for more of it, before Curran sent the December 13 letter. I shall therefore recommend dismissal of this allegation of the complaint and recommend overruling the corresponding objection.

Alleged discrimination

The complaint alleges that the Respondent violated Section 8(a)(3) by issuing warning notices to both Bartol and Dyer on November 12 and by issuing 2 warning notices to Bartol on November 15. The General Counsel contends that the Respondent's warning notice system was instituted in response to the organizational attempt and that these warning notices that were issued pursuant that new system are, of themselves, unlawful. As stated in *Economy Foods*, 294 NLRB 660 (1989):

> The use of a warning system as part of a disciplinary procedure is permissible when the procedure is not implemented in response to protected union activities of employees. When the warning system is issued to discourage union activity, it is impermissible. *Joe's Plastics*, 287 NLRB 210, 211 (1987). As the Respondent instituted the written warning system in response to the union activity, we find that the new system was intended to and does discourage union activity and violates Section 8(a)(3) and (1) of the Act.
>
> Further, the written warnings issued pursuant to this system similarly violate the Act and must be removed from employees' records. Accordingly, we find that the written warnings issued to [named employees] also violated Section 8(a)(3) and (1) of the Act. 2/
>
> 2/ In finding the written warning system and warnings issued pursuant to it to be violative of the Act, we are not thereby negating the offenses at issue. Were such offenses subject to an oral warning before the union organizing campaign, then they might similarly be subject to oral warnings concurrent with the union campaign. What was unlawful was for the Respondent to change from an oral to a written warning system in order to discourage union activity.

The Respondent did issue a written warning notice to Bartol on April 30 when he failed to appear for a scheduled safety meeting. That action, however, was clearly the exception to the rule and hardly proves that a "system" of written warning notices existed prior to the advent of the union activities.

[12] See *De Luca Brothers, Inc.*, 201 NLRB 327 (1973) (posting "for sale" signs on capital equipment after making an express threat to close independently violated Section 8(a)(1)).

Except for the April 30 warning notice, when employees engaged in unapproved behavior Curran would only "look at" them or, at most, send reminders to them about what was expected of them in the future. Certainly, Curran had never before used the word "warning" (in writing or orally) which inherently threatens an employee that his or her tenure of employment is in peril. Moreover, Curran admitted that he instituted the warning notice system because of the Respondent's employees' organizational attempt when he testified that fellow contractors urged him to "document, document, document," after he told them that his employees were organizing. This testimony by Curran was an admission that he planned to use the warning notices against any employee who thereafter claimed to have been discriminated against because of his union activities. That is, Curran has stated a reason, but not a lawful excuse, for instituting the system of warning notices. Therefore, under the authority of *Economy Foods*, I find and conclude that the Respondent violated Section 8(a)(3) by its issuance of the November 12 and 15 warning notices to Bartol and Dyer.

The complaint further alleges that the Respondent violated Section 8(a)(3) by suspending Bartol for 3 days on December, 3, and by suspending him for 10 days on December 19, both in order to discourage the union activities of its employees. In order to prove such an allegation of discrimination in violation of Section 8(a)(3), the General Counsel must first persuade the Board that antiunion sentiment, or animus, was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In this case, the Respondent's animus toward its employees' union activities is amply demonstrated by Curran's unlawful threats of job loss if the employees selected the Union as their collective-bargaining representative, as I have found above. Also, the Respondent's animus was more than amply demonstrated by Curran's statements to O'Neill, when O'Neill demanded recognition, that "I'm going to shut the guys down right now, lay them all off" and that he would "close the doors and the Company" rather than honor a desire by the Respondent's employees to be represented by the Union. The Respondent admits that Curran had knowledge of Bartol's prounion sympathies at the times of the suspensions; therefore, under *Wright Line* the burden has shifted to the Respondent to demonstrate that it would have taken the same actions even if its employees had not engaged in union activities.

The Respondent contends that it meted out the suspensions solely because Bartol failed to appear for work on November 29, as specifically instructed, and that he (and Dyer) walked off the job on December 18. The Respondent also contends that it has shown that, absent his union activities, Bartol would have been discharged, not just let off with a suspension.

In accord with my above-stated credibility resolutions, I find that Bartol, on or about November 23, asked Curran for November 29 off in order that he might visit his family in Green Bay. I further believe Curran's testimony that he thought he had been lied to when Bartol left a voice-mail message that he was not coming to work on November 29 because he could not find daycare for his child. Without more, it would be easy to dismiss this allegation of the complaint because, as stated in *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966):

> The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.

Of course, the greater includes the lesser; if the Respondent had a right to discharge Bartol for his perceived misconduct, it had a right to suspend him. The Respondent had the right to suspend (or discharge) Bartol for failing to appear for a scheduled work day on November 29, or for leaving work without permission on December 18, if, in so doing, it was not treating Bartol disparately.[13]

The General Counsel contends that the cases of McMahon, Liberstat and Hart demonstrate disparate treatment against Bartol. In none of those cases, however, had the employee received a categorical, written, non-violative warning notice that further absences from work without permission would be considered "grounds for termination," which is exactly what Curran had warned Bartol of on April 30. In spite of that notice, however, Bartol failed to appear for work on November 29, and he did so under circumstances that would reasonably have led Curran to believe that Bartol had directly disobeyed him. Not only had Curran told Bartol individually that he must be at work on November 29, Curran had informed all employees (including Bartol), in writing, that they had to be at work on that date. Assuredly, some punishment was in order. Otherwise, how could the Respondent expect Bartol or other employees to be present on future mandatory work days? The answer is that it could not, even if the employees had received prior, valid warnings about attendance. The General Counsel has therefore failed to prove disparate treatment of Bartol. Accordingly, I find and conclude that the Respondent has shown that, even absent Bartol's prounion sympathies, it would have (at least) suspended him for his failure to appear at work on November 29. I shall therefore recommend dismissal of this allegation of the complaint.

Similarly, when Bartol walked off the job on December 18, he did so not only as the only employee who had been validly warned about possible discharge for future attendance violations, he did so, under my finding immediately above, as the only employee who had been validly suspended for such misconduct. And there can be no doubt that on December 18, Bartol engaged in misconduct. Although Bartol and Dyer were credible in their testimony that Curran had told them that he would meet them back at the job at 12:00 p.m. and that he would then decide if it was safe to resume work, even the General Counsel's witness Dyer readily admitted that employees were not free just to walk off the job without contacting Curran, even if the weather is bad. Also, Bartol had the perfect opportunity to contact Curran before he left. Soetaert testified that before Bartol and Dyer left the job on December 18, he offered to them the use of his cell phone to call Curran "and find out what to do"; moreover, Soetaert testified that he told Bartol that they "probably should" do so. On brief, the General Counsel ventures no theory of why I should discredit Soetaert. In fact, the General Counsel does not even mention this most critical testimony. Again, the cases of McMahon, Liberstat and Hart are similar, but those employees had not been validly warned and validly suspended before they engaged in their misconduct. Accordingly, I find and conclude that the General Counsel has failed to prove disparate treatment of Bartol. Rather, I find that the Respondent has shown that, even absent Bartol's prounion sympathies, it would have at least suspended him for his leaving the job without contacting Curran on December 18. I shall therefore also recommend dismissal of this allegation of the complaint.

The Objections

The Union filed objections to the December 17 Board election by alleging that the Employer had "laid off, discharged, and/or disciplined employees for union activity ... [and] threatened employees with reprisals for participating in union activities, for example, by threatening to close the business and curtail operations ... [and] took action that adversely affected employees' jobs because of union activity."[14] I recommend that those objections be sustained to the extent that they refer to the November 12 warning notices that Curran issued to Bartol and Dyer, to the extent that they refer to the 2 November 15 warning notices that Curran issued to Bartol, and to the extent that they refer to the Respondent's threatening employees with loss of job opportunities in its December 5 letter to employees and by its use of newspaper advertisements and "for sale" signs to fortify that threat. To the extent that the Charging Party's objections refer to anything more, I recommend that they be overruled.

[13] See, generally, the Board's discussion in *Avondale Industries, Inc.*, 329 NLRB 1064 (1999).
[14] As the Regional Director's report indicates, the Union withdrew certain other objections that it had filed.

Conclusions of Law

1. By threatening its employees with loss of job opportunities if they selected the Union as their collective-bargaining representative, the Respondent has violated Section 8(a)(1).

2. By issuing one warning notice each to Bartol and Dyer on November 12, and by issuing 2 warning notices to Bartol on November 15, the Respondent has violated Section 8(a)(3).

3. The Respondent has not otherwise violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Curran & Co., of Marquette, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with loss of job opportunities if they choose to be represented by the Union.

(b) Issuing warning notices to, or otherwise discriminating against, employees because they have engaged in activities on behalf of the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the warning notices that it issued to Bartol and Dyer on November 12 and 15 and, within 14 days from the date of this Order, remove from its files any reference to those warning notices, and within 3 days thereafter notify Bartol and Dyer in writing that this has been done and that those warning notices will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facility in Marquette, Michigan, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to each current employee and former employee employed by the Respondent at any time since November 12, the date of the first unfair labor practice found herein.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(C) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election that was held on December 17, 2002, in Case 30–RC–6507 is set aside and that this case is severed from case 30–CA–16296-1 and remanded to the Regional Director for Region 30 of the Board for the purpose of conducting a new election at such time as he or she deems the circumstances permit the employees' free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the previously stipulated appropriate bargaining unit whenever the Regional Director deems it to be appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employees employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in any economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Local 1510, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington D.C.,

David L. Evans
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD (the Board)
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW
SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT
GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with loss of job opportunities if you choose as your collective-bargaining representative Local 1510, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the Union).

WE WILL NOT issue warning notices to you, or otherwise discriminate against you, because you have become or remained members of the Union or have given assistance or support to it.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the warning notices that we issued to Kenneth Bartol and Jason Dyer on November 12 and 15, 2002, and WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning notices that were issued to those employees, and WE WILL, within 3 days thereafter, notify both of them in writing that this has been done and that their warning notices will not be used against them in any way.

CURRAN & CO.

Dated:_

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

310 West Wisconsin Avenue, Federal Plaza, Suite 700, Milwaukee, WI 53203-2211

(414) 297-3861, Hours: 8 a.m. to 4:30 p.m

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-1819.